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In The
Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, CALIFORNIA, ET AL.,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S LAW CENTER; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law, the Minority Media and Telecommunications Council, the National Asian Pacific American Legal Consortium, the National Partnership for Women & Families, the National Association for the Advancement of Colored People and the Puerto Rican Legal Defense and Education Fund, Inc. represent people of color, women, individuals with disabilities and other disadvantaged populations under various federal civil rights statutes. Many of these statutes have direct causes of action, while others are implied. These statutes have differing remedial provisions guided by the unique legislative purpose of each law.

Through precedents like *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) and *Wright v. Roanoake Redevelopment & Housing Authority*, 479 U.S. 418 (1987), the Court has articulated an analysis for determining whether a federal statute has a "comprehensive" remedial scheme that is incompatible with remedies under § 1983. This analysis by necessity is statute specific, focusing on the remedies provided by the statute and Congress' intent in providing those remedies. Any departure from this well established

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of the brief.

framework in favor of a simplistic rule of thumb as advocated by the Solicitor General would have a direct and limiting effect on the *amici's* ability to continue to press claims on behalf of its disadvantaged constituencies. Accordingly, the following *amici* offer their views on this important issue.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, a past Attorney General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country challenging discrimination in virtually all aspects of American life. The Lawyers' Committee has a keen interest in proper interpretation of statutory law so as not to unduly limit the availability of remedies for plaintiffs seeking to redress violations of federal civil rights laws, and has most recently offered its views to the Court in the following cases: *Commissioner v. Banks/ Banaitis,* ___ U.S. ___, 125 S. Ct. 28 (2004); *Pennsylvania State Police v. Suders,* ___ U.S. ___, 124 S. Ct. 2342 (June 14, 2004) and *Jones v. R.R. Donnelley and Sons Co.,* ___ U.S. ___, 124 S. Ct. 1836 (May 3, 2004).

The Minority Media and Telecommunications Council ("MMTC") is a national nonprofit membership corporation, founded in 1986 and both incorporated and domiciled in the District of Columbia. MMTC is dedicated to promoting equal opportunity and eliminating all vestiges of segregation in the media and telecommunications industries regulated by the FCC. MMTC represents other organizations in FCC rulemaking proceedings, operates a media brokerage, trains law students, and conducts conferences and seminars. Its members include media and telecom employees and managers and entrepreneurs.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, NAPALC and its affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its affiliates have a long-standing interest in civil rights issues that have an impact on the Asian American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

Founded in 1971, the National Partnership for Women and Families, formerly known as the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for all and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination and has filed numerous briefs *amicus curiae* in the United States Supreme Court and the federal circuit courts of appeals.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

SUMMARY OF ARGUMENT

Congress enacted 42 U.S.C. § 1983 to insure that all litigants have available the substantive and financial means to vindicate federal constitutional and statutory rights. *Felder v. Casey*, 487 U.S. 131, 139 (1988) (providing a means for individuals whose federal constitutional or statutory rights are violated to recover damages or equitable relief is the central purpose of § 1983). Section 1983

presumptively makes damages and attorneys' fees available to any litigant who demonstrates deprivation of an enforceable federal Constitutional or statutory right, absent Congress' express or implicit intent to preclude § 1983 remedies. *Smith v. Robinson*, 468 U.S. 992, 1006 (1984) (legislative history and Court's jurisprudence demonstrate that § 1988 (implemented through § 1983) is a broad grant of authority for award of attorneys' fees to plaintiffs seeking to enforce federal statutory rights – a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust) (citations omitted). *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (legislative history indicates that § 1983 should be "liberally and beneficently construed"). Section 1983 has become a crucial weapon in the fight to protect Americans from arbitrary deprivation of civil and other statutory rights. Without the damages and attorneys' fees authorized by § 1983, many poor and middle-class persons could not afford to assert the rights provided to them by federal law against even the most egregious violations. Enforcement of many statutory rights would also be so economically unfeasible even for the non-indigent as to leave their availability subject to the whim of government officials. As *amici's* experience and decades of published judicial decisions demonstrate, § 1983 is an indispensable tool in the fight against arbitrary or malicious deprivation of our rights as Americans.

Ignoring the presumption in favor of § 1983 claims, the Solicitor General of the United States, in its *amicus* brief filed on behalf of the government, invites the Court to announce two bright-line rules: (1) that *any* statutory provision for individual judicial review makes a remedial scheme so "comprehensive" as to demonstrate Congress'

implicit intent to preclude § 1983 remedies, and, (2) that the absence of a specific provision for attorneys' fees automatically renders a statute incompatible with § 1983 because § 1983 does provide for attorneys' fees. The first of these conclusions contradicts this Court's well-developed jurisprudence, which requires a statute-by-statute analysis of individual remedial schemes to determine whether they are sufficiently comprehensive to rebut the presumption that § 1983 is available. The second ignores precedent, Congressional intent and logic by arguing that § 1983, a statute whose very purpose is to encourage claims by providing for attorneys fees, can only be invoked in connection with a statute that already provides for attorney's fees.

Neither of the government's propositions needs to be addressed to resolve the question actually before the Court – whether the particular statute at issue, the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) (the "TCA"), incorporates a remedial scheme sufficiently comprehensive to demonstrate Congress' implicit intent to override the presumption in favor of § 1983 relief. There is no need for the Court to abandon its well-established jurisprudence requiring a case-by-case analysis of an individual statute in order to determine whether the TCA's remedial scheme is sufficiently comprehensive to preclude a § 1983 claim.[2]

[2] *Amici* will not address the issue of whether the TCA does in fact include a sufficiently comprehensive scheme to preclude a § 1983 action because such an explication is unnecessary. The parties will no doubt explore that question in detail. *Amici's* primary interest herein is in urging the Court to preserve its traditional statute-by-statute analysis rather than accepting the Solictor's invitation to adopt radical new bright-line rules that would apply to future § 1983 claims and substantially narrow the scope of that statute.

The consequences of adopting the government's position on the disadvantaged constituencies represented by *amici* would be substantial. For these reasons, *amici* urge the Court to decline the government's invitation to abandon its long-established jurisprudence requiring statute-by-statute analysis in favor of over broad bright-line rules that would eviscerate § 1983.

ARGUMENT

I. Provision For Judicial Review Does Not In Itself Constitute A Comprehensive Remedial Scheme Proving That Congress Intended To Override The Presumption In Favor Of Access To Section 1983

A. The Government Argues That Provision For Judicial Review Is Dispositive

The government states that "§ 332(c)(7)(B)(v) does provide a private judicial remedy to ensure that States and local governments live up to their obligations. Accordingly, it is sufficiently comprehensive to preclude a § 1983 action. . . ." (Brief for the United States As *Amicus Curiae* Supporting Petitioners ("Brf.") at 20. It also states that "Congress' creation of a judicial cause of action such as § 332(c)(7)(B)(v) to enforce a federal right, with its express and necessarily implied incidents under federal law, is 'sufficiently comprehensive' to indicate a congressional intent to preclude a § 1983 action to enforce the same right." Brf. at 17 In other words, identification of *any* provision for access to the courts meets the "substantial

burden" of rebutting the presumption against a finding that Congress implicitly intended to preclude a § 1983 claim. This conclusion simply does not comport with the Court's well established jurisprudence on the subject.

B. The Court's Jurisprudence Places A Heavy Burden On A Party Attempting To Show That A Remedial Scheme Is Sufficiently Comprehensive To Rebut The Presumption Of Access To Section 1983

The Court through a series of detailed decisions has articulated a much more complex analysis than the simplistic rule of thumb suggested by the government to determine whether Congress implicitly intended to foreclose a § 1983 claim. As the government admits, "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." Brf. at 13 (quoting *Gonzaga Univ. v. Doe,* 536 U.S. 273, 284 (2002)). *See also Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (demonstration of an enforceable federal statutory right creates a rebuttable presumption of enforceability via § 1983). The burden of demonstrating that Congress has foreclosed a § 1983 cause of action rests on the party claiming this preclusion. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (holding that burden to demonstrate that Congress has precluded a § 1983 action rests with the party opposing the claim, once the other party has established an enforceable federal right).

As the Court's jurisprudence clearly establishes, such a showing can be made only where the statute on which the § 1983 claim is predicated includes a *comprehensive*

remedial scheme that is incompatible with § 1983. *Blessing*, 520 U.S. at 341 (presumption may be rebutted where comprehensive remedial scheme is incompatible with individual enforcement, thus demonstrating Congress' implicit intent to foreclose recourse to § 1983). The Court has described this as a "difficult showing" to make. *Suter v. Artist M.*, 503 U.S. 347, 360 n.11 (1992) (litigants seeking to establish such intent must make the difficult showing that allowing § 1983 actions to go forward would be inconsistent with Congress' carefully tailored scheme); *Wright*, 479 U.S. at 423-24 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984) ("We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right."); *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994) (presumption of availability of § 1983 where enforceable federal right violated can be overcome only in exceptional circumstances).

C. The Court Has Looked To A Variety Of Factors In Determining Whether A Particular Scheme Is "Comprehensive" And Has Never Laid Down A Bright-Line Rule

As the government acknowledges, the Court has only twice found a statutory remedial scheme sufficiently comprehensive to warrant a conclusion that § 1983 is unavailable. Brf. at 14 (citing *Sea Clammers*, 453 U.S. at 13 and *Smith*, 468 U.S. at 1010-12). The government repeatedly suggests that these decisions rested solely on the fact that the statutes at issue contained provisions for individual judicial review. Brf. at 14-15, 17. The government is mistaken.

The government's characterization of these cases contradicts the Court's own interpretation. In *Blessing*, the Court examined its prior decisions in *Sea Clammers* and *Smith*. The Court explained the multiple factors it relied on in determining that in those two cases the very difficult showing of an implicit intent to displace § 1983 had been made. The Court began by pointing out that *Sea Clammers*:

> focused on the 'unusually elaborate enforcement provisions' of the Federal Water Pollution Control Act, which placed at the disposal of the Environmental Protection Agency a panoply of enforcement options, including noncompliance orders, civil suits, and criminal penalties. . . . We emphasized that several provisions of the Act authorized private persons to initiate enforcement action. . . . We found it "hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies, including the two-citizen suit provisions."

Blessing, 520 U.S. at 347 (citations omitted).

Regarding *Smith v. Robinson* the Court stated that because the Education of the Handicapped Act "permitted aggrieved individuals to invoke 'carefully tailored' local administrative procedures followed by federal judicial review. . . . Congress could not possibly have wanted parents to skip these procedures and go straight to court by way of § 1983, since that would have 'rendered superfluous most of the detailed procedural protections *outlined in the statute*.'" *Id.* (emphasis added) (citations omitted).

As the Court recognized in *Blessing*, both *Sea Clammers* and *Smith* relied on a number of factors in determining that the two "unusually elaborate" enforcement schemes at issue were so comprehensive as to compel a conclusion that Congress implicitly intended to foreclose resort to § 1983. These opinions did not default to a simplistic rule of thumb that the plaintiff had access to judicial review and leave it at that. Rather, the Court did a true analysis before determining that the remedial schemes before it were "comprehensive." *Amici* believe the Court should continue this type of analysis on a statute-by-statute basis.

The government cites three more cases – *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987); *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) and *Blessing v. Freestone*, 520 U.S. 329 (1997) – in support of its proposed new rule. Brf. at 18-19. It first claims *Wright* held that because the statute before it did not explicitly provide for judicial review, it could not be sufficiently comprehensive to evidence Congressional intent to foreclose § 1983. *Id.* Even if this were true, it would be irrelevant. That failure to provide for review might preclude a finding of comprehensiveness does not mean that providing for review compels a finding of comprehensiveness. The second proposition simply does not follow from the first. *Wright* did not reach its conclusion "because" of the statute's lack of a judicial review provision, as the government suggests. The *Wright* opinion analyzed a claim that because Congress had vested exclusive enforcement authority in a particular agency (the department of Housing and Urban Development), private § 1983 relief was unavailable. The *Wright* opinion points out that the agency did not consider itself

to have exclusive enforcement authority. *Wright*, 479 U.S. at 426-27. The Court observed that the agency itself assumed the availability of private lawsuits. *Id.* It therefore rejected the assertion that § 1983 was foreclosed. *Id.* at 427-28. While *Wright* did point out that provision for judicial review is evidence of Congressional intent to displace § 1983, it certainly did not state that provision for judicial review is in itself *proof* of such intent.

The government's reference to *Wilder* is no more availing. *Wilder* did point out that *Sea Clammers* and *Smith* had cited the availability of judicial review as among the many factors to be considered in determining whether Congress intended to foreclose resort to § 1983. It did not, however, rely solely on the availability of judicial review in reaching its conclusion, let alone announce a *per se* rule. Indeed, *Wilder* specifically noted that in *Sea Clammers* the Court had relied on the "comprehensive enforcement scheme" at issue in that case – including agency enforcement powers, provision for citizen suits, and provision for criminal penalties. *Wilder*, 496 U.S. at 521. *Wilder* also observed that in *Smith*, the Court held that it was the "elaborate administrative scheme" that manifested Congress' desire to foreclose resort to § 1983. *Id.* In other words, *Wilder* applied rather than supplanted the analytical framework the Court discussed in *Sea Clammers*.

Finally, the government asserts that in *Blessing*, the Court rejected a claim that the statute before it was sufficiently comprehensive to preclude § 1983 remedies, solely because the statute lacked a provision for judicial review. Brf. at 19. Even if this were true, it would not prove the converse – that inclusion of any provision for relief compels a conclusion of comprehensiveness.

In fact, *Blessing* undercuts the government's position. As discussed above, *Blessing* demonstrates that the Court considers a variety of well-defined factors in determining comprehensiveness. In *Blessing*, the Court not only examined its prior holdings in *Sea Clammers* and *Smith* and discussed the factors considered in those opinions, but also cited the fact that the statute it was examining lacked provisions for access to administrative review. And the Court also cited the relatively weak enforcement powers of the state official charged with administering the relevant aid program. *Blessing*, 520 U.S. at 348. *Blessing* did not pronounce a bright-line rule that lack of a judicial review provision in itself precludes a finding of "comprehensiveness" – let alone a rule that access to judicial review automatically compels such a finding.

The Court has never announced or relied on any kind of bright-line rule regarding provision of judicial review in determining whether a remedial scheme is sufficiently comprehensive to rebut the presumption that § 1983 claims are available. Instead, it has looked to a variety of factors to determine whether a *comprehensive* remedial scheme exists. None of the cases cited by the government suggest otherwise. As resort to a new rule is neither necessary nor supported by case law, the Court should reject the government's interpretation.[3]

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[3] The government also asserts that provision for judicial review will "not always be necessary in order to supplant the § 1983 remedy. Depending on the particular context, remedial schemes that do not afford meaningful judicial review may nevertheless be sufficiently 'comprehensive' to satisfy this Court's analysis, *e.g.* by providing appropriate administrative avenues for relief." Brf. at 17, fn 3. This statement, which is irrelevant to resolution of the instant case, appears to conflict with the government's claim that cases such as *Wright*,

(Continued on following page)

II. That A Particular Statute Is Silent On The Availability Of Attorneys' Fees Does Not Support A Conclusion That It Is "Incompatible" With Section 1983

The government also argues that if a statute does not contain a specific attorney fee provision, that statute is incompatible with § 1983 because § 1983 does contain an attorney fee provision. Brf. at 22-23 (citing the "American rule" and *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 695 (3d Cir. 2002)). This cannot be correct. If § 1983 were applicable only to statutes with a fee provision, its fee provision would be redundant. It is a fundamental canon of statutory construction that redundancies are to be avoided. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (statutes should not be construed as to render any provision redundant or superfluous); *United States v. X-Citement Video*, 513 U.S. 64, 69-70 (1994) (statutes should not be construed as to lead to an absurdity). The government's interpretation would render § 1983 redundant as to the recovery of attorney fees. The Court should therefore reject it.

Courts have routinely permitted § 1983 actions to go forward notwithstanding lack of an explicit attorney fee

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Wilder, and *Blessing* demonstrate that lack of a provision for judicial review in itself rendered the statutes at issue insufficiently comprehensive to find implied preclusion. This Court has, moreover, stressed that "[a] plaintiff's ability to invoke § 1983 cannot be defeated simply by 'the availability of administrative mechanisms to protect the plaintiff's interest.'" *Blessing*, 520 U.S. at 347. In any event, the import of the government's comment is that each remedial scheme must be carefully examined on a case-by-case basis to determine whether the relief provided for is sufficiently "comprehensive" to foreclose resort to § 1983 – a position directly contradictory to the government's invitation to the Court to announce simplistic new bright-line rules.

provision in the underlying statute. *See e.g. Maher v. Gagne*, 448 U.S. 122, 133 (1980) (claim predicated on 42 U.S.C. § 602); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (same); *National Home Equity Mortgage Ass'n v. Face*, 322 F.3d 802, 804 (4th Cir. 2003) (claim predicated on 12 U.S.C. § 3801 *et seq.*); *Native Village of Venetie IRA Council v. State of Alaska*, 155 F.3d 1150, 1153 (9th Cir. 1998) (claim predicated on 25 U.S.C. § 1911). Congress is presumed to be aware that courts have routinely permitted § 1983 claims to proceed notwithstanding lack of an attorney fee provision in the applicable statutory scheme. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1998) (Congress is presumed to be aware of how courts have interpreted the law and to take that interpretation into account in composing statutes). Had Congress found fault with this practice, it doubtless would have included language in the TCA (and other statutes that do not have an express attorney fee provision as to which courts routinely permit § 1983 cases to proceed) to ensure that its intent to foreclose such fees was understood. That it has not done so demonstrates the incorrectness of the government's position. *Id.; Maine*, 448 U.S. at 8 (Congress' silence in face of Court's many interpretive pronouncements on the scope of § 1983 significant evidence of Congressional intent).

Indeed, the government's position would nullify the very purpose of including a fee provision in § 1983 which is to encourage litigation of meritorious civil rights claims notwithstanding financial obstacles. *Felder*, 487 U.S. at 139 (providing a means for individuals whose federal constitutional or statutory rights are violated to recover damages or equitable relief is the central purpose of § 1983). *See also Jonas v. Stack*, 758 F.2d 567, 569 (11th Cir.

1985) (§ 1988's "primary function is to shift the costs of civil rights litigation from civil rights victims to civil rights violators."). To hold that § 1983 fees are not available just because the statute at issue does not expressly provide for them, would obviously undermine this Congressional intent. As the government's proposed bright-line rule would nullify § 1983's fee provision, the Court should reject it. *X-Citement Video*, 513 U.S. at 69-70 (statutes should not be construed as to lead to an absurdity); *TRW*, 534 U.S. at 31 (statutes should not be interpreted such as to render any provision nugatory).

III. Adoption Of The Two Proposed Bright-Line Rules Proposed By The Government Would Nullify Section 1983 Entirely

While adoption of the government's proposed bright-line rule on attorneys' fees would nullify § 1983's attorney fee provision, adoption of both of the bright-line rules proposed by the government would nullify § 1983 entirely. Statutes providing attorneys' fees for successful litigants obviously presume access to the courts. The government argues that access to the courts in itself renders a statute sufficiently "comprehensive" to evidence implicit preclusive intent. It also argues that a statute without an attorney's fee provision cannot be compatible with § 1983. Thus, according to the government's logic, no statute could *ever* provide a basis for a § 1983 claim. A statute that does not provide for attorneys' fees would be incompatible for that reason, and one that does provide for attorneys' fees would be too comprehensive. Such a facially absurd and disabling construction is obviously to be avoided.

IV. Creation Of Two Sweeping Bright-Line Rules That Would Greatly Restrict The Scope Of Section 1983 Is Unnecessary To Resolution Of The Instant Case

Fortunately, it is not necessary for the Court to resort to sweeping and destructive new rules in order to resolve the case before it. There is no reason why the Court cannot resolve the question as it has resolved all such questions in the past --by engaging in a careful examination of the entire remedial scheme to determine whether the "difficult showing" of comprehensiveness and incompatibility has been made. Neither party has limited itself to arguing that access to judicial review or access to attorneys' fees are the only factors to be considered in this analysis, and there is no reason for the Court to address the government's contentions in this regard.[4]

There is no need for the Court to eviscerate § 1983 in the manner suggested by the government in order to resolve this case. Instead, the Court can either apply the plain language of the savings clause or, if the Court is not convinced that clause is dispositive, proceed to apply the traditional, comprehensive analysis of all factors bearing on the scope of the remedial scheme at issue. The Court

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[4] Both sides, for example, will doubtless discuss the impact of the "expedited" nature of the judicial review provided by the TCA on the analysis. They will also certainly debate whether the TCA's savings clause is in itself dispositive, thus rendering examination of the "comprehensiveness" of the TCA's remedial scheme unnecessary. *Amici* herein express no opinion on these subjects, nor the other factors that will doubtless be extensively addressed in other briefing. *Amici* submit, however, that to the extent the Court concurs that any of the additional factors discussed by the parties or other *amici* are germane to the analysis, such factors reinforce the conclusion that resort to the drastic measures proposed by the government is unnecessary.

should therefore decline to announce the restrictive new rules urged by the government.

CONCLUSION

For the foregoing reasons, this Court should reject the government's invitation to craft new bright-line rules that any provision for judicial review forecloses resort to § 1983 and that lack of an attorney fee provision in itself renders a statute incompatible with § 1983.

Respectfully submitted,

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